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In the Supreme Court

OF THE

United States.

The American Book Company,
Plaintiff in Error,
vs.
The State of Kansas, ex relatione Galen Nichols, County Attorney of Shawnee County, Kansas,
Defendant in Error.

October Term, 1903. No. 126.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR ON MERITS AND ON MOTION TO DISMISS.

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Statement of the Case.

This is a writ of error prosecuted to review a judgment of ouster pronounced by the Supreme Court of the State of Kansas against the American Book Company. The suit was one instituted in the Supreme Court of the State in the nature of *quo warranto* by the State upon the relation of Galen Nichols, County Attorney of Shawnee

County, to oust the American Book Company from transacting business in Kansas upon the ground of its failure to comply with a certain Act of the Legislature of the State of Kansas, commonly called the Bush Corporation Act.

Under the statutes of Kansas the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished and the remedies heretofore obtainable in those forms may be had by civil action. (See section 5148 of the General Statutes of 1901.)

So much of the Bush Corporation Act as is appurtenant to this controversy is printed as an appendix to this brief, namely, sections 1259, 1260, 1261, 1262, 1263, 1264 and 1283 of the General Statutes of 1901.

The American Book Company was charged with having violated the statute in three particulars, as follows: First, in failing to make application to the charter board for authority to transact business as a foreign corporation and paying the fees prescribed; second, in failing to file with the Secretary of State its written consent irrevocable that actions might be commenced against it in any county in the State in which a cause of action should arise or in which the plaintiff should reside.

by service of process upon the Secretary of State; third, in failing to file the annual report provided by section 1283.

The petition in this case was filed in the Supreme Court on June 7, 1902. Summons was issued and served, under which the defendant had until July 18 within which to plead. On July 11, upon an *ex parte* application of the attorneys for the State and without notice to the defendant, one of the justices granted a temporary injunction, so-called, which appears at page 7 of the Record. This injunction was forthwith served upon the defendant. It will be observed that it was to all practical intents and purposes a final judgment in the case, in the respect that it forbade the defendant transacting any business in the State pending the hearing of the cause, and practically accomplished an expulsion of the defendant from the State in advance of trial, and even in advance of an opportunity to plead to the petition.

The defendant thereupon filed a motion to set aside this injunction, which is set forth at page 8, *et seq.*, of the Record. This was presented for hearing in chambers before four of the Justices. The Justices, however, refrained from passing upon the motion to vacate the injunction, but ruled

the defendant to answer to the merits by the 18th of July and set the case down for final hearing on its merits on the following Monday, the 21st. Within the time limited the defendant filed an answer, which is set forth at length on page 16, *et seq.*, of the Record. In its answer the defendant expressly invoked the protection of the Constitution of the United States and raised various Federal questions appurtenant thereto in this, to wit:

First, that the business of the defendant within the State of Kansas was solely that of interstate commerce, and the Act of the Legislature of the State of Kansas could have no lawful application to such business, and the Court was without power to exclude the defendant from the transaction of the business of interstate commerce within the State of Kansas.

Second, it was alleged that the defendant had, prior to the passage of the Bush Corporation Act of 1898, entered into contracts with certain persons and corporations in the State of Kansas for the sale and delivery of the commodities published and manufactured by defendant, which said contracts were still in full force and effect, and under which the defendant had incurred liability, and it was thereupon charged that if said Act be con-

strued as applicable to the defendant and to authorize the Court to grant the judgment of ouster and to thereby preclude the defendant from performing its contracts so as aforesaid made, the Act was in further violation of section 10 of article 1 of the Constitution as being a law impairing the obligation of a contract.

When it came to the trial it was conceded that the business of the defendant was solely that of interstate commerce, and by reason of this admission the Court declined to permit proof. The Court, however, held that the terms of the Act applied as fully to corporations engaged solely in interstate commerce as to those engaged in any other character of business; that the Act was a legitimate exercise of the power of the State, and consequently the defense was not well taken.

Upon the second Federal protection invoked, the existence of the facts averred in the answer was conceded upon the trial. The Court, whilst announcing that it would bear this condition in mind and reserve to the defendant in any adverse judgment which it might pronounce the right to continue in the performance of such contracts, when it came to enter judgment, ignored this situation and pronounced an absolute judgment of

ouster without reservation or qualification. Other defenses to the proceeding were interposed and raised upon the hearing, but as they are not of a Federal character it is not necessary to notice them here. Suffice to say that the Court held against the defendant upon all of the contentions which it urged and entered the judgment to review which this writ of error is prosecuted.

Specification of Errors.

I.

The court erred in holding that the provisions of the Act of 1898, as amended by chapter 125 of the Laws of 1901, in so far as they apply to foreign corporations, engaged solely in the business of interstate commerce, do not constitute a regulation and restriction upon interstate commerce within the prohibition of section 8 of article 1 of the Constitution of the United States, and are therefore void.

(This is set forth in Assignment of Errors 1, 2, 3, 4 and 5.)

II.

The Supreme Court of the State of Kansas erred in its judgment of ouster in denying to this plaintiff in error the right to perform contracts made by this defendant prior to the passage of the

Act of 1898 and in excluding said plaintiff in error absolutely from the State of Kansas, thereby so construing the Act of 1898, as amended by the Act of 1901, as to render it violative of section 10 of article 1 of the Constitution of the United States, in that it impaired the obligations of said defendant's contracts.

III.

The Supreme Court of the State of Kansas erred in its judgment of ouster in denying to this plaintiff in error the right to enforce through the courts of the State a contract made prior to the passage of the Act of 1898, thereby denying to the plaintiff in error the equal protection of the laws and depriving it of its property without due process of law, as guaranteed to plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

IV.

The Court erred in pronouncing a judgment of ouster in said cause against the plaintiff in error.

ARGUMENT.

The Bush Corporation Act Void in so far as it Attempts to Regulate Corporations Engaged Solely in Interstate Commerce.

As will be seen by an examination of the statutes appended to our brief, no attempt is made to classify foreign corporations engaged in business in Kansas in respect to the nature of such business. There was no question in the case in regard to the character of the business conducted by plaintiff in error in Kansas. Paragraph three of the answer sets out with some degree of detail the facts. It appears that the only business transacted by the American Book Company in the State of Kansas was that of selling school text books, reference books and other publications to dealers and merchants in the State of Kansas. It is averred in this paragraph of the answer:

"That this defendant is the owner of certain copyrights and prepares and manufactures its own books and publications. That for such purposes this defendant owns and operates, in Cincinnati, Ohio; Chicago, Illinois, and New York City, certain factories and binderies, wherein the type for its publications is set and the same are completely printed, bound and prepared for sale and transportation to customers. That this defendant does not now, and did not at the time of the bringing

of this suit, own any property connected with the manufacture and sale of said business within the State of Kansas, nor any other property whatsoever, within the said State. That this defendant has been, and is now, engaged in selling its said publications to dealers and merchants located at various points in the State of Kansas and other States of the United States, and in making such sales packs and ships its said publications over appropriate railroads, consigned to the persons to whom they are sold, and delivers them to the consignees in the original packages in which they were packed for shipment. That with reference to the State of Kansas all sales of such merchandise made by this defendant are of goods manufactured and shipped from points in other States to points within the State of Kansas and there delivered in the original packages to such purchasers."

The following extracts from the bill of exceptions sufficiently indicate the view which the Court took of this defense (p. 38):

"Chief Justice Doster: Let me say this, gentlemen, that so far as one question that the defense in this case wishes to raise is concerned, the court is ready to pass on it and it may be passed on for the purpose of shortening the work of the case. Whether this corporation is engaged in interstate commerce or not, or, rather, assuming it to be engaged in what is called interstate commerce business, we shall hold that it is subject to reasonable legislation and regulation. That is the law. That is the decision of the Federal courts. While a corporation is engaged in interstate commerce and may not be excluded wholly from the State—must be allowed to do business in the State—that is, interstate business—yet all the holdings are that it is subject to reasonable regulation.

Mr. Histed: Your honor's suggestions leave me in some doubt as to the course of procedure, whether or not the court decides at this time that the answer as pleaded in paragraph 3 constitutes no defense. I take it that is what the court has decided, and that no evidence will be permitted on that point.

Chief Justice: If you mean by that to interpose the objection that you are engaged in interstate trade and therefore are not subject to regulations of this Bush Act, then you are correct—it is no defense.

Mr. Histed: The requirements of the Bush Act are various, as applied even to foreign corporations, and of course, with the general statement which your honor makes of the view of the law, it may or may not be applicable to this defense.

Chief Justice Doster: The State in this case makes three claims. One is that you are required to apply for permission to do business, refiling your New Jersey charter or something like that, and on doing that you could obtain a permit to transact business here. Another is that you were required to file reports of your business; and another is that you were required to file an irrevocable power of attorney, appointing some person upon whom service can be made; and that you did not do any one of those things, and for that reason that you should be ousted.

Mr. Histed: There is also the other requirement which I suppose your honor included within the first; that is, that we shall pay a certain fee, conditioned on the amount of the charter. I suppose the court also holds that this is incumbent upon the company.

Chief Justice Doster: We had not heard that matter discussed.

. . . . . .

Mr. Histed: To get this question so we will

understand it, do I understand the court would sustain an objection to any evidence offered under paragraph 3 of this answer?

Chief Justice Doster: Yes, sir.

Mr. Histed: To which ruling of the court the defendant objects and excepts, because the business of the defendant is within the protection of section 8 of article 1 of the Constitution of the United States, as pleaded."

Again, on page 49, while the assistant managing director of plaintiff in error was upon the stand, the following occurred:

"I offer to show by this witness that the character of the business of this defendant, at the time this suit was brought, and now and ever since the Bush Act was passed, was solely that of interstate commerce.

Mr. Quinton: We object to that as not proper under the rulings.

Mr. Chief Justice Doster: Your pleadings set that up. The court ruled on that before and refused to allow you to show that, and we still hold to that ruling.

Mr. Histed: To which ruling the defendant excepts."

The judgment as pronounced by the Court was:

"That the defendant, The American Book Company, be ousted from the exercise of the right to transact business as a corporation in the State of Kansas until its compliance with the statutes of this State providing for the making of an application to the Charter Board of the State to do such business, and the filing of a certified copy of its charter or articles of incorporation, and a statement of the matters and things required by section 2 of chapter 10 of the Special Laws of 1898, and

the payment of the fees required by law. (Page 31 of the Record.)

Under the interpretation placed by the Supreme Court upon this statute, as well as upon the facts in this case, it therefore must be accepted that the regulations and requirements provided by the Bush Corporation Act apply to the same extent to corporations engaged solely in the business of interstate commerce as to those engaged in any other class of business. The construction placed by the Supreme Court of Kansas is, of course, binding upon this Court.

New York State v. Roberts, 171 U. S. 661.

The single question presented is whether thus construed this legislation is a valid and permissible State regulation of corporations engaged in that business, or whether on the other hand it transcends the power of the State and is in violation of section 8 of article 1 of the Constitution of the United States.

It will be observed in the first instance that a charter board is created to which a corporation must apply for authority to engage in business in the State. Its ability to transact business in the State thereafter is not a matter of right founded upon the Federal Constitution, but is dependent upon the permission of this charter board. The corporation must present, first, a certified copy of its

charter or articles of incorporation; second, an application which shall set forth the place where its principal office or place of business is to be located; third, the full nature and character of the business in which it proposes to engage; fourth, the names and addresses of the officers, trustees or directors, and stockholders of the corporation; fifth, a detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine its solvency. The application must be accompanied by a fee of twenty-five dollars, to be known as an application fee. And by the terms of sec. 1261, Gen. Stat. 1901 (sec. 3, ch. 10, Laws 1898):

"In all cases where such applications are made by corporations organized under the laws of any other state, territory or foreign country, and as a condition precedent to obtaining authority to transact business in this State, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State in which the cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation," etc.

By section 5 of the Act of 1898, (Appendix,

1263), it is required that the charter board shall hold at least one meeting each month, and it then provides:

"The board shall make a careful investigation of each application and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted. [And in case of domestic corporation, charter shall be issued.] In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized in this State, the application shall be granted and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this State as hereinafter provided."

Section 1 of chapter 125 of the Laws of 1901 (1264 Gen. Stat. 1901) provides for the payment of a charter fee by either foreign or domestic corporations, which is graduated upon the amount of its capital stock as follows: One-tenth of one per cent upon the first one hundred thousand dol-

lars; one-twentieth of one per cent upon the next four hundred thousand dollars, and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The capital stock of the American Book Company is $5,000,000, fully paid, which would require the payment of $1,300.00 fees as a condition precedent to its right to engage in business in the State.

To recapitulate the provisions of this statute: There is lodged in the charter board a wide and extended power, to be exercised in its discretion in the admission of foreign corporations. It is sought to vest in this board the right to determine the legality and validity of the charter issued to the corporation by a foreign State, and to that extent to exercise a power of supervision and revision over the acts of the duly constituted officers of such other State. Furthermore, no matter how legitimate may be the business which the foreign corporation is authorized to transact, if the statutes of Kansas have failed to provide for corporations for such business, the board is, impliedly at least, given the right to reject the application. The corporation is required to exhibit to the minutest degree of detail its entire financial affairs and must

make them a matter of public record in this State, and this will include among other things the names and addresses of the stockholders. It must submit itself to the jurisdiction of the State courts, and this requirement is in language so general that it cannot be said to be confined even to causes of action which originate in the State. Finally, it must pay into the treasury of the State the graduated license tax provided by section 1264. No distinction is made among the corporations in this respect, nor any right of discretion conferred upon the board to adjust or vary this license fee. The volume of business to be transacted or the length of time within which the corporation may be engaged in the business in the State is of no consequence.

After the corporation shall have received the permit it is then required to file annual statements, which shall set forth a great variety of information, among which are, first, the authorized capital stock; second, the paid-up capital stock; third, the par value and the market value per share of said stock; fourth, a complete and detailed statement of the assets and liabilities of the corporation; fifth, a full and complete list of the stockholders, with the postoffice address of

each, and the number of shares held and paid for by each; sixth, the names and postoffice addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. These reports must appear upon blanks to be prepared by the secretary of state and approved by the charter board, and must be accompanied by a further fee of one dollar. In addition, the secretary of state is authorized to require a further or supplementary report. As a penalty for the failure to file such reports by foreign corporations, the section provides:

"And such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State, shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper."

And as a further penalty in the same section:

"No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State, without first obtaining the certificate of the secretary of state that the statements provided for in this section have been properly made."

Declining to allow even an opportunity for ar-

gument upon the subject, the learned Chief Justice of the Supreme Court of Kansas declared that these were reasonable regulations which the State might lawfully impose upon corporations engaged solely in the business of interstate commerce, and said that he also expressed the view of his brethren of the court. With great deference to that learned tribunal, we submit that if an obvious conclusion without argument is to be gathered from this record, it is a conclusion exactly contrary to the one reached by that court. It is difficult to conceive a set of regulations which would impose greater hindrances and obstructions to interstate commerce than those evidenced by the Bush Corporation Act. If the construction of the Supreme Court of Kansas is to be upheld, the wholesaling corporation of Chicago cannot sell and deliver to its customer in Topeka, Kansas, a five-pound package of coffee until it receives the sanction of this charter board and pays the large fee exacted by it. The American Book Company, whose entire factory, warehouse and place of business are outside of the State of Kansas, cannot employ the avenues of trade or the highways of commerce within the State of Kansas without first submitting to similar requirements and exactions.

It cannot supply a local bookdealer with an arithmetic printed, bound and shipped from beyond the State until it shall have first paid into the treasury of the State thirteen hundred dollars and submitted itself to the jurisdiction of the court. Indeed, the case is more extreme even than the illustration given, because if for any reason, good, bad or indifferent, the charter board should determine that the capital of the company is impaired, or the corporation was not legally organized, it may, despite the tender of such fees and of performance of the other requirements of the Act, absolutely exclude the corporation from transacting business at all.

It seems to us that the case is squarely ruled by the decision of this Court in *Crutcher v. Kentucky*, 141 U. S. 47. The Act of the Legislature in that case prohibited the agent of any express company not incorporated by the laws of that State from setting up, establishing or carrying on the business of transportation in the State without first obtaining a license from the auditor of public accounts. By section 2 of that Act it was required that before the auditor should issue such license there should be filed in his office a copy of the charter of the company and a statement

made under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock and how paid, and of what the assets of the company consisted, the amount of losses due and unpaid by said company, and all other claims against the company due or not due; and must further show that the company is possessed of an actual capital of at least $150,000, either in cash or in safe investments, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it was made the duty of the auditor to issue a license upon the payment of a fee of $2.50.

We trust we may be pardoned for putting upon our brief the language of this Court, disposing of the contentions of the State in respect to this statute (p. 56):

"We regret that we are unable to concur with the learned Court of Appeals of Kentucky in its views on this subject. The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky, a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the

State law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the State Legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State Legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State Legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on

their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Again, on page 58, the Court said:

"As was said by Mr. Justice Lamar, in the case last cited [*Norfolk & Western R. R. v. Pennsylvania*, 136 U. S. 114, 118], 'It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.'

We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S. 114.

As a summation of the whole matter, it was aptly said by the present Chief Justice in *Lyng v. Michigan*, 135 U. S. 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' "

In *Hooper v. California*, 155 U. S. 648, 652,

the distinction between the case of a foreign corporation engaged in interstate commerce and one whose business is purely local and the respective rights of the State to interfere and impose restrictions is pointed out.

Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 734, involved the construction of section 10 of article 15 of the constitution of Colorado, providing as follows:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

And also a statute enacted to carry the foregoing clause into effect. This Court said (p. 734):

"So it is clear the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States. The prohibition against doing any business cannot, therefore, be literally interpreted."

In *Pembina Consolidated, etc., Milling Co. v. Pennsylvania*, 125 U. S. 181, it was held:

"The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employes of the corporation, does not impinge

upon the commercial clause of the Federal Constitution (Article I, section VIII, clause 3), provided the corporation is neither engaged in carrying on foreign or interstate commerce, nor employed by the Government of the United States."

It is true that in *Emert v. Missouri*, 156 U. S. 296, this Court upheld a statute of Missouri requiring all peddlers to take out a license. It was held to be within the police power of a State to regulate the occupation of itinerant peddlers, citing (on page 313) the following quotation from *Brown v. Maryland*, 12 Wheat. 443:

"The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way."

Commenting on the foregoing, Mr. Justice Peckham, in *Schollenberger v. Pennsylvania*, 171 U. S. 23, said:

"It was held to be within the police power of the State to regulate the occupation of itinerant peddlers and to compel them to obtain licenses to practice their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall in *Brown v. Maryland*, *supra*, was quoted, that 'the right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way.' It was the privilege of selling in a peculiar way, as a peddler, which was licensed in the Emert case, and such a person, it was therein decided,

could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling in the same way articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.

The Emert case *does not overrule or affect* the cases above cited as to the right to sell."

This Court accordingly held that a statute of Pennsylvania prohibiting the sale of oleomargarine was void in so far as it attempted to apply to and exclude interstate importations and sales.

Applying this decision to the case at hand, there is sought to be vested in this charter board by the statutes of Kansas, as construed by its Supreme Court, a right of absolute exclusion from the State of the American Book Company, whose business is conceded by the Court to be solely interstate commerce. There is and can be no pretext of a rightful exercise of the police power such as was relied upon in the oleomargarine case. The commodity dealt in here, school and text books and other similar supplies, is manifestly a wholesome and useful one, necessary in fact to the welfare and advancement of the community. It is to be observed that there is no attempt throughout the entire text of this legislation toward regulation of products, or the exercise of any supervision or right of inspection of commodities

sold and delivered; nor, in fine, of any power referable to the police power of the State. The right of regulation asserted is of the corporation itself, and this in matters wholly apart from and foreign to any valid claim of police control.

In *Hopkins v. United States*, 171 U. S. 578, 597, Mr. Justice Peckham said:

"In all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

Here, as we have remarked, no claim even can be made that the charges and exactions imposed by the Act are for any local facility for the transaction of commerce. In no respect is the commerce conducted by the plaintiff in error aided or facilitated by anything which it must do under the requirements of this law. There is not annexed to the sales any privilege or immunity which did not already obtain. The case is one which falls clearly upon the side of those distinguished by the Court in the Hopkins case. The State seeks to meet the corporation upon its borders and abso-

lutely prohibit it from coming into the State with its product except upon the terms prescribed. It is not an attempt to direct or control the sale in any peculiar method, but is an absolute denial of the right to sell at all.

In *Leloup v. Port of Mobile*, 127 U. S. 640, 644, where an attempt had been made to require the Western Union Telegraph Company to pay a license tax, this Court said:

"In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do."

So here, the fee required under the provisions of section 1264 is purely a tax on the privilege of doing the business of the corporation. It is none the less liable in addition to pay taxes to the county and all subordinate municipalities upon any property which it may have there subject to taxation, at the same rate and to the same extent as other incorporations and individuals are required to do.

As in that case, so in this, there is put the ques-

tion propounded by the Court, which we quote, together with the answer given (p. 645):

"Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

In *Brennan v. Titusville*, 153 U. S. 289, it was decided that:

"An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

After a most interesting and instructive discussion of the law, Mr. Justice Brewer quoted the

language above set out from *Leloup v. Mobile*, and then added (p. 303):

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constition to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

Pullman Co. v. Adams, 189 U. S. 420, which is the most recent decision of this Court, illustrates the case at hand. The contention of the Pullman Company was that by section 195 of the State Constitution of Mississippi it was compelled to transport passengers from one point to another within the State and that consequently the tax as imposed upon sleeping car companies was in effect a burden upon its interstate commerce. This Court said (p. 421):

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was

held bad in *Crutcher v. Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne v. Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

It seems to us that the question presented by the case at bar is a simple and elemental one, which has been decided many times by this Court. There is no question here of the nature of the business, because the allegations of the defendant are conceded in the most ample terms by the lower court. Neither is there any room for the assertion of a police power for the preservation of the lives and health or morals of the community or to insure their well being in any respect. In simple terms the position of the State is the assertion of the unrestricted right to exact a license from a foreign corporation before it may be permitted to transact purely interstate commerce, and this not a nominal tax, but a large sum of money. Upon that question, of course, the decisions of this Court are final and ultimate authority.

It would be but an idle task to place upon the brief similar decisions of State courts, although one

quite in point is that of *Bateman v. Western Star Milling Company*, 1 Texas Civil Appeals, p. 90, 20 S. W. 931. Texas had a statute requiring all corporations desiring to transact business in the State to file with the secretary of state a duly certified copy of their articles of incorporation and to pay a fee ranging from twenty-five to two hundred dollars, according to the amount of their capital stock. The syllabus sufficiently elucidates the facts:

"A corporation domiciled in Kansas, through its commercial agents, solicited business and sold and shipped goods and merchandise to points in other states. Held, that such transactions were 'interstate commerce,' and that a state law providing that no foreign corporation shall transact any business or maintain any action in such State without having first filed their articles of incorporation with the secretary of state is void, as being a violation of the interstate commerce law, and cannot operate to deprive such corporation of its right to bring an action in such State."

On page 932 the Court said:

"The principle is well established that it rests purely within the discretion of a State to recognize or to repudiate a foreign corporation; that it can, if such be its pleasure, exclude such a corporation entirely, or admit it conditionally. This principle, however, is not of universal application. A very emphatic and well-fixed instance in which it does not obtain is where a foreign corporation is engaged in interstate or foreign commerce. That

provision of the Federal Constitution which provides that 'Congress shall have power to regulate commerce with foreign nations, and among the several States,' constitutes such regulation a domain of legislation peculiarly within Federal prerogative."

It will be observed that in the Kansas Supreme Court, the learned Chief Justice, in his opinion, lays much stress upon the fact that the Bush Corporation Act makes no discrimination between foreign and domestic corporations; that it treats them both alike.

In Robbins v. Shelby Taxing District, 120 U. S. 489, 497, this Court thus disposes of a similar contention:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."

Specification of Errors Nos. 2 and 3.

We will discuss these two specifications of error together. In the opening statement we have pointed out that the Court, while indicating a disposition to protect the rights of the American Book Company in so far as its ability to perform and enforce contracts made prior to the passage of the Bush Act was concerned, when it came to enter judgment failed to do so. The judgment was an absolute writ of ouster pronounced against the plaintiff in error. Under the judgment thus entered against it, it would have no more right to enter the State with its products in fulfillment of any pre-existing contract than it would to make new sales and new contracts. It is excluded from the State absolutely and entirely for all purposes. The doors of the State courts are closed against it. It has no recourse to enforce performance of any obligation due it unless it be through the Federal tribunals. And in view of the jurisdictional requirement, it is obvious that in many instances it does not possess this remedy.

Certainly, this is an anomalous situation, in which the plaintiff in error, through no fault upon its part, finds itself. It is difficult to believe that the Legislature of Kansas could have contemplated

such a purpose by this statute. However this may be, the Supreme Court of the State having thus construed the law and declared such to be its meaning, it must be so accepted in this Court. Thus interpreted, we submit that the Act is clearly void for the reasons stated in these two specifications of error. There was something more than an alteration in the remedy accomplished by this statute. It is the withdrawal and denial of all remedy whatsoever, and is, therefore, clearly a denial to the plaintiff in error of the equal protection of the law and of due process of law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and an impairment of its existing contracts.

Specification of Error No. 4.

The vital and controlling question in this case is the one discussed under specification of error No. 1. If we are right in our position there taken, the judgment is one which the Supreme Court of Kansas had no right nor power to make. We therefore respectfully submit that the judgment should be reversed and the cause remanded, with

instructions to enter a judgment in favor of the plaintiff in error.

W. H. Rossington,
Chas. Blood Smith,
Clifford Histed,
Attorneys for Plaintiff in Error.

As to the Motion to Dismiss.

Since preparing the foregoing brief on the merits, we have been served by the defendant in error with notice of a motion to dismiss this writ of error. The motion is made upon the ground that the question involved has been determined by the act of plaintiff in error in complying with the judgment of the Supreme Court of Kansas.

We also have notice that proof will be filed in support of this motion, but its nature is not disclosed. We assume that such proof will be transcripts of the records of the charter board, showing that the American Book Company has paid some thirteen hundred dollars, and in other respects met the exactions of the Bush Corporation Act.

We, of course, admit the force of the rule that where there is nothing for this Court to determine—where the question between the parties is at rest and only a moot question is presented—this Court will refuse to consider the appeal.

We have filed counter-affidavit and proof to show that this controversy is still unsettled and undetermined; that there is sought to be visited upon the American Book Company by the State of Kansas the force and effect of the judgment to review which this writ of error is prosecuted, and that the State is contending further that the compliance above adverted to is no compliance because it was made too late.

This claim is put forth in a suit brought by the State to cancel and set aside as void certain contracts made by the American Book Company with the State Text Book Commission, permissive in their character, and under which the Book Company agreed to furnish and sell to the public schools of the State for a period of five years certain text books. The judgment of ouster was pronounced against the plaintiff in error in the latter part of July, 1902, but it had already entered into these contracts and was under heavy bond to commence performance by the first of September. The time was therefore pressing, and under the stress of this public necessity and the bonds which it had given for performance, it felt coerced to make the payments aforesaid and to otherwise comply with the statute as interpreted by the Su-

preme Court in the case at bar. Almost immediately, however, the State instituted the action referred to to vacate and set aside the contracts and to declare them illegal and void because of the fact that they were executed prior to the time the American Book Company had received authority from the charter board to transact business in Kansas.

These facts are set forth at length in an affidavit filed in this Court by us in resistance of the motion, to which we have attached a copy of the brief on the part of the State upon this question. We cannot, nor can this Court, in this case undertake to determine or anticipate what the decision of the Supreme Court shall be in this pending cause. At all events, it conclusively appears from this proof, which will not be denied, that the American Book Company is still under the stress of this statute, and that the State is still seeking to exclude it from doing business by virtue of its requirements.

Manifestly, the assertion by the State in said controversy that the compliance with the statute by the American Book Company and the payment of the charter fees under the provisions of the Corporation Act came too late and did not protect the

contracts is the equivalent to a declaration that the Company has not complied at all. It necessarily, therefore, again raises the question of the power of the State to impose such a condition upon the right of the Book Company to engage in the business of interstate commerce within the borders of the State of Kansas, because it stands as one of the conceded propositions in the case that the business appurtenant to these permissive contracts is interstate.

We therefore submit that this is not a moot question before this Court, but a vital question between the same parties to this same controversy, and calls for a decision of this Court. It is to be presumed that the State Supreme Court will adhere to its former ruling concerning the right of the State to regulate foreign corporations engaged in interstate commerce, and upon such adherence pivots the existing and dependent controversy which, as this Court will observe, is identical as to subject-matter and parties with the suit at bar.

Under the circumstances, therefore, the reason of the rule in this Court ceasing, the rule itself ceases. The State continuing to assert the principle of this decision against the American Book

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Company ought not to be heard to say that the matter in controversy is put at rest.

All of which is respectfully submitted.

W. H. Rossington,
Chas. Blood Smith,
Clifford Histed,
Attorneys for Plaintiff in Error.

APPENDIX.

Sec. 1259. CHARTER BOARD.—Sec. 15. There is hereby created a charter board, to be composed of the attorney-general, the secretary of state, and the state bank commissioner. The attorney-general shall be the president and the secretary of state the secretary of said board. [L. 1898, ch. 10, sec. 1; January 11, 1899.]

Sec. 1260. APPLICATION FOR CHARTER.—Sec. 16. Persons seeking to form a private corporation under any of the laws of this State, or any corporation organized under the laws of any other State, Territory, or foreign country, and seeking to do business in this State, shall make application to said board, upon blanks supplied by the secretary of state, for permission to organize a corporation, or to engage in business as a foreign corporation in this State. Such application shall set forth—

If a corporation to be organized under the laws of this State: 1st. The name desired for such corporation. 2d. The place where its principal office or place of business is to be located. 3d. The length of time for which said corporation is to exist. 4th. The full nature and character of the business in which it proposes to engage. 5th. The names and addresses of the proposed incorporators. 6th. The proposed amount of the capital stock.

If a corporation organized under the laws of another State, Territory, or foreign country, and seeking to do business in this State: 1st. A certified copy of its charter or articles of incorporation. 2d. The place where its principal office or place of business is to be located. 3d. The full nature and character of the business in which it proposes to engage. 4th. The names and ad-

dresses of the officers, trustees or directors and stockholders of the corporation. 5th. A detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine the solvency of the corporation. Such statement shall be subscribed and sworn to by the president and secretary or by the managing officer of said corporation. [Id., sec. 2.]

Sec. 1261. Fees; Service of Process.—Sec. 17. Each application for permission to organize a corporation, or to engage in business in this State as a foreign corporation, shall be accompanied by a fee of twenty-five dollars, to be known as an application fee; and in all cases where such applications are made by corporations organized under the laws of any other State, Territory or foreign country, and as a condition precedent to obtaining authority to transact business in this State, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State in which the cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation, and shall be executed by the president and secretary of the company, authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the said secretary and president to execute the same. Every foreign corporation now doing business in this State shall, within thirty days from the taking effect of this

act, file with the secretary of state its written consent as above specified. [Id., sec. 3.]

Sec. 1262. Actions, Where Brought; Record. —Sec. 18. Actions against any corporation organized under the laws of any other State, Territory, or foreign country, and doing business in this State, may be brought in any county where the cause of action arose or in which the plaintiff may reside. The summons shall be directed to the secretary of state, and shall require the defendant to answer by a certain day, not less than forty days nor more than sixty days from its date. Said summons shall be forthwith forwarded by the clerk of the court to the secretary of state, who shall immediately forward a copy thereof to the secretary of the corporation sued; and thereupon said secretary of state shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copy, the name and address of the person to whom he forwarded said copy, and the costs for service and return thereof. Such return shall be under his hand and seal of office, and shall have the same force and effect as a due and sufficient return made by the sheriff on process directed to him. Said secretary of state shall keep a suitable record book, in which he shall docket every action commenced against a corporation, the time when commenced, the date and manner of service; also, the date of the judgment, its amount and costs, and the date of payment thereof, which shall be certified from time to time by the clerk of the court. There shall be taxed as costs a fee of two and one-half dollars for each case so docketed, which fee shall be collected as other costs in the case, and forwarded by the clerk of the court to the state treasurer, who shall execute his receipt therefor in duplicate, one to be mailed to

the clerk of the court, and the other to be filed with the secretary of state. [Id., sec. 4.]

Sec. 1263. MEETINGS OF BOARD; INQUIRY.—Sec. 19. The charter board shall hold at least one meeting each month in the office of the secretary of state, and at such other times as may be deemed necessary, subject to call by the secretary. The board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the persons named in the application have been authorized by the charter board to form a private corporation as set forth in the application, reciting the proposed name and character thereof. In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized in accordance with the laws of the State, Territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized in this State, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this State as hereinafter provided. [Id., sec. 5.]

Sec. 1264. CHARTER FEE.—Sec. 20. Each cor-

poration which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this State, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the State, Territory, or foreign country under whose laws they are incorporated;

and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner and to the same extent as is herein provided for the chartering and organizing of new corporations. [L. 1898, ch. 10, sec. 6, as amended by L. 1901, ch. 125, sec. 1; May 1.]

Sec. 1283. ANNUAL STATEMENTS; PENALTY; TRANSFER OF STOCK; FORFEITURE; ACTION NOT MAINTAINED.—Sec. 39. It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this State, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each. 6th. The names and post office addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such reports shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and

the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this State, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney-general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official State paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this State, as soon as any transfer, sale or change of ownership of any such stock is made, as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporations, the number of shares held by each, and the amount paid on each share of capital stock. No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State without first obtaining

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the certificate of the secretary of state that statements provided for in this section have been properly made. [L. 1898, ch. 10, sec. 12, as amended by L. 1901, ch. 125, sec. 3; May 1.]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 126.

THE AMERICAN BOOK COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *State of Kansas*, } ss:

Chas. Blood Smith, being first duly sworn, upon his oath deposes and says:

That he is one of the counsel of the American Book Company in this cause, and is personally knowing to the matters and things hereinafter stated.

And affiant says that it is true that after the decision of the supreme court in the above-entitled cause, and after the appeal had been taken and allowed, but before the same was finally perfected, the American Book Company did submit to the terms of said statute and did pay the said charter fee for the following reasons:

That the Text-Book Commission Company was not a party to the suit herein pending and might assert that it was not bound thereby; that the said American Book Company had, as appears from this record, given bond in a large amount for the due performance of its contract, and in addition thereto had, in preparation for the performance of such contract, expended a large amount of money.

And affiant further says that under the terms of its said contract and agreement it had only until the 15th of September in which to supply the wants of the public schools in Kansas with the books it had contracted to deliver, and under the stress of this public necessity, and under the sanction and penalties of its contract, it felt coerced to make the payment aforesaid and to otherwise comply with the statute as interpreted by the Supreme Court in the case at bar.

That thereupon the said State of Kansas almost immediately instituted another suit in the district court of Shawnee county, Kansas, asserting that, inasmuch as such compliance was made after the contracts had been signed, the same came too late and the right to do the particular business the doing of which was sought to be questioned in the suit at bar, and which, as appears in the record in this case, is wholly a business of interstate commerce, was not authorized or perfected by such compliance; that, on the contrary, as to such business it was the same as if no compliance had been made at all.

That the said suit was instituted by the same law officer of the State and in the name of the State as the suit at bar, and in its said petition the State prayed for the annulment of the contracts which the said American Book Company

had made with the Text-Book Commission, appearing at large in the record herein, and that the performance of such contract should be perpetually enjoined.

An application was made to the said district court of Shawnee county for a temporary injunction, which was refused, and thereupon an appeal was prosecuted to the supreme court of the State of Kansas, which appeal is therein pending at the present time and undetermined; that, as appears by the brief recently filed by the State of Kansas in said cause, the said State is contending that the judgment of the supreme court of the State of Kansas here complained of is binding and conclusive upon the American Book Company, and that it amounts to an adjudication that the said American Book Company had not the right to perform the contracts in question in Kansas by reason of the fact that at the time said contracts were entered into the said Book Company had not complied with the requirements of the statute of the State of Kansas in that behalf, as adjudged by the said supreme court of the State of Kansas in the case at bar.

That the supreme court of the State of Kansas is asked to determine this question upon its merits and of necessity to reassert and reaffirm the decision made in the case here upon appeal. In evidence of this contention we hereunto append, marked "Exhibit A," a copy of the brief filed by the State of Kansas in that cause, which affiant declares was duly served upon him as one of the counsel for the American Book Company.

That in said cause we have again invoked the protection of section 8 of article 1 of the Constitution of the United States, and the controversy thereby made is still pending

and undetermined in the supreme court of the State of Kansas. As evidence that we have done so, we hereto attach, marked "Exhibit B," that portion of our brief in which we again argue this question before the Supreme Court of the United States, which we assert is a part of the brief which we have prepared and are about to file in said cause.

Affiant further declares that between the parties to this suit there still exists a controversy, undetermined and unsettled, involving the right of the State to enforce this statute against a corporation engaged entirely in the doing of interstate commerce business to prevent such corporation from transacting such business within the State of Kansas unless the terms and provisions of said statute are complied with.

And further affiant saith not.

CHAS. BLOOD SMITH.

Subscribed and sworn to before me this 29th day of October, A. D. 1903.

[SEAL.] E. B. NELSON,
Notary Public.

Commission expires January 18, 1907.

EXHIBIT "A."

IN THE SUPREME COURT, STATE OF KANSAS.

THE STATE OF KANSAS, *Plaintiff in Error*,
vs.
THE AMERICAN BOOK COMPANY ET AL., *Defendants in Error.*
No. 13348.

BRIEF FOR PLAINTIFF IN ERROR.

OTIS E. HUNGATE,
County Attorney,
QUINTON & QUINTON,
G. C. CLEMENS,
Attorneys for Plaintiff in Error.

(Here follows brief, omitted in printing.)

* * * * * * *

EXHIBIT "B."

EXTRACT FROM BRIEF OF AMERICAN BOOK COMPANY IN STATE OF KANSAS v. AMERICAN BOOK COMPANY—SUPREME COURT OF KANSAS.

The Questions Involved in the Quo Warranto Case of Necessity Revived in this Case in the Event of a Decision Favorable to Plaintiff in Error on the Merits.

In anticipation of any adverse decision by the court in this case on the merits. we desire to here announce that we deny the ultimate controlling force of the decision of this court in the case of The State *ex rel.* Galen Nichols against The American Book Company *et al.*, known in this argument as the *quo warranto* case, heretofore decided. A decision by this court that full compliance with the law by taking out a permit and paying a charter fee under the provisions of the corporation act came too late and did not protect the contracts would be equivalent to a decision that the company has not complied at all and would of necessity again raise the question of the power of the State to impose such a condition upon the right to engage in the business of interstate commerce within the borders of the State of Kansas. A reference to the record in the *quo warranto* case shows that it was asserted in a timely fashion that these provisions of the Kansas law were inapplicable to the business done or contemplated by the American Book Company and could not be interposed as a restraint upon the free

transaction thereof, and the court, assuming that this business was wholly interstate, held that none the less were the terms of the statute and all the terms of the statute applicable to a foreign corporation seeking to engage solely in interstate commerce in Kansas. We controverted the soundness of that position of the court then and we controvert it now, and we respectfully suggest and predict that this court will ultimately overrule its decision. The American Book Company has taken the case in question to the Supreme Court of the United States, and it is there pending.

We are here again met with this question in another form, because, without the assumption that the decision of this court in that case is sound in law, this case would have no substratum to stand upon. It is only by assuming in the first instance that the company was compelled to pay this large charter fee and otherwise comply with the terms of this statute that any support is found to the proposition that it paid it too late to save pre-existing contracts from being declared void. It is therefore an inescapable question in this case, and the court, to sustain the position of the plaintiff in error, is bound to again hold that these particular provisions of the statute are coercive upon the American Book Company in respect to the doing of an interstate-commerce business. The pleadings, which are part of the proof in this record, the contracts themselves, and the opinion of the court in this case make this clear.

We, therefore, ask that if the court is going to determine this case upon its merits, it shall revise its former judgment, which we assert to be erroneous.

We will not argue this question at length, but will restate in a few words the propositions of law, with appropriate

citations of authority upon this head, and ask that the court will read and consider them with a view of determining the rightfulness of its prior decision, being convinced that a candid and careful revision of its judgment will compel the overruling of the decision already made. We renew our contention in that case here and submit that chapter 10 of the Session Laws of 1898, as amended by chapter 125 of the Laws of 1901, in so far as they apply to foreign corporations engaged solely in the business of interstate commerce, constitute a regulation and restriction of such commerce within the prohibition of section 8 of article 1 of the Constitution of the United States and are therefore void.

Crutcher vs. Kentucky, 141 U. S., 47.
Hooper vs. California, 155 U. S., 648, 652.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727, 734.
Pembina, etc., Consolidated Milling Co. vs. Pennsylvania, 125 U. S., 181.
Schollenberger vs. Pennsylvania, 171 U. S., 1, 23.
Hopkins vs. United States, 171 U. S., 578, 597.
Leloup vs. Port of Mobile, 127 U. S., 640, 644.
Brennan vs. Titusville, 153 U. S., 289, 303.

[Endorsed:] No. —. United States Supreme Court. American Book Company *vs.* State of Kansas *ex rel.* Galen Nichols, county attorney. Affidavit. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for plaintiff.

[Endorsed:] File No. 18,658. Supreme Court U. S., October term, 1903. Term No. 126. The American Book Co., pl'ff in error, *vs.* The State of Kansas *ex rel.* Galen Nichols. Affidavit of Chas. Blood Smith. Filed Nov. 2d, 1903.